IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 391.

JOSEPH B. BRUNER, *Petitioner*,

v.

UNITED STATES OF AMERICA.

BRIEF FOR WILLIAM A. BEAL, ET AL., AMICI CURIAE.

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This case is here on certiorari to review the decision of the Court of Appeals for the Fifth Circuit reported at 189 F. 2d 255. Certiorari was acquiesced in by the United States because of conflict with the decision of the Court of Appeals for the Sixth Circuit in *Beal* v. *United States*, 182 F. 2d 565, in the construction of 28 U. S. C. 1346(d)(2). Certiorari was granted on October 22, 1951, and both parties consented to the filing of this brief in view of the interest of the amici, as parties to the *Beal* case, in the issues there raised.[1]

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[1] On October 30, 1951, after certiorari was granted, Sec. 1346(d)(2) was amended so as to bar hereafter salary claims in the District Courts by either "officers" or "employees" of the United States. Sec. 50, Pub. Law 248, 82nd Cong., 65 Stat. 710, 727). This amendment, of course, deprives the case of its "practical significance for the more than 800,000 classified civil service employees" urged by the Solicitor General in his acquiescence to the writ. However, the present case was not rendered moot since the amendment did not affect pending actions. See Point IV of brief, *infra*, at page 30, *et seq.*

OPINIONS BELOW.

The per curiam opinion of the Court of Appeals below is reported at 189 F. 2d 255. The conflicting opinion of the Court of Appeals for the Sixth Circuit is reported at 182 F. 2d 565.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 29, 1950. Jurisdiction of this court was invoked, and acquiesced in, under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the claim of petitioner, a civilian fire fighter, appointed by a commanding officer in the field to a position not specifically created by statute, was within the scope of 28 U. S. C. 1346(d)(2) depriving the District Courts of jurisdiction of salary claims by any "officer of the United States".

2. Whether Pub. Law 248 (65 Stat. 727) of October 31, 1951, precluding "employees" as well as "officers" from suing in the District Courts, applies to pending cases, particularly where, as here, the Statute of Limitations has now barred a new action in the Court of Claims, leaving the petitioner with no forum for the enforcement of rights otherwise within the protection of the Fifth Amendment.[2]

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[2] Amici, after the decision in *Beal* v. *United States*, supra remanding the case for trial, obtained a judgment in the District Court for the Eastern District of Kentucky, on March 16, 1951. Hence they would in no event presumably be affected by Pub. Law 248, since no further action will be required on their claims by the District Court, unless error in the proceedings is found by the Court of Appeals on the government's appeal. Cf. *Kans. Pac. Ry. Co.* v. *Twombly*, 100 U. S. 78; approved in *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 189.

CONSTITUTION AND STATUTES INVOLVED.

Sec. 2 of the Act of June 27, 1898 (30 Stat. 494) amended Sec. 2 of the Tucker Act (24 Stat. 505) by adding the following:

> The jurisdiction hereby conferred upon the * * * district courts shall not extend to cases brought to recover fees, salary or compensation for official services of officers of the United States * * *.

The provision was carried over as Section 24(20) of the Judicial Code of 1911 (36 Stat. 649; 28 U. S. C. 41(20)) so as to read:

> Nothing in this paragraph [dealing with suits against the United States] shall be construed as giving * * * to the district courts jurisdiction of cases brought to recover fees, salary or compensation for official services of officers of the United States * * *.

and was rephrased in the 1948 Revision of the Judicial Code, 28 U. S. C. 1346(d)(2) as follows:

> The district courts shall not have jurisdiction of: * * * (2) Any civil action to recover fees, salary or compensation for official services of officers of the United States.

On October 31, 1951, by Pub. Law 248, 82nd Cong., 1st Sess., Sec. 50 (65 Stat. 710, 727) the subsection was amended by inserting after "officers", the words "or employees".

Article II, Section 2, Clause 2 of the Constitution provides in part:

> * * * The Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

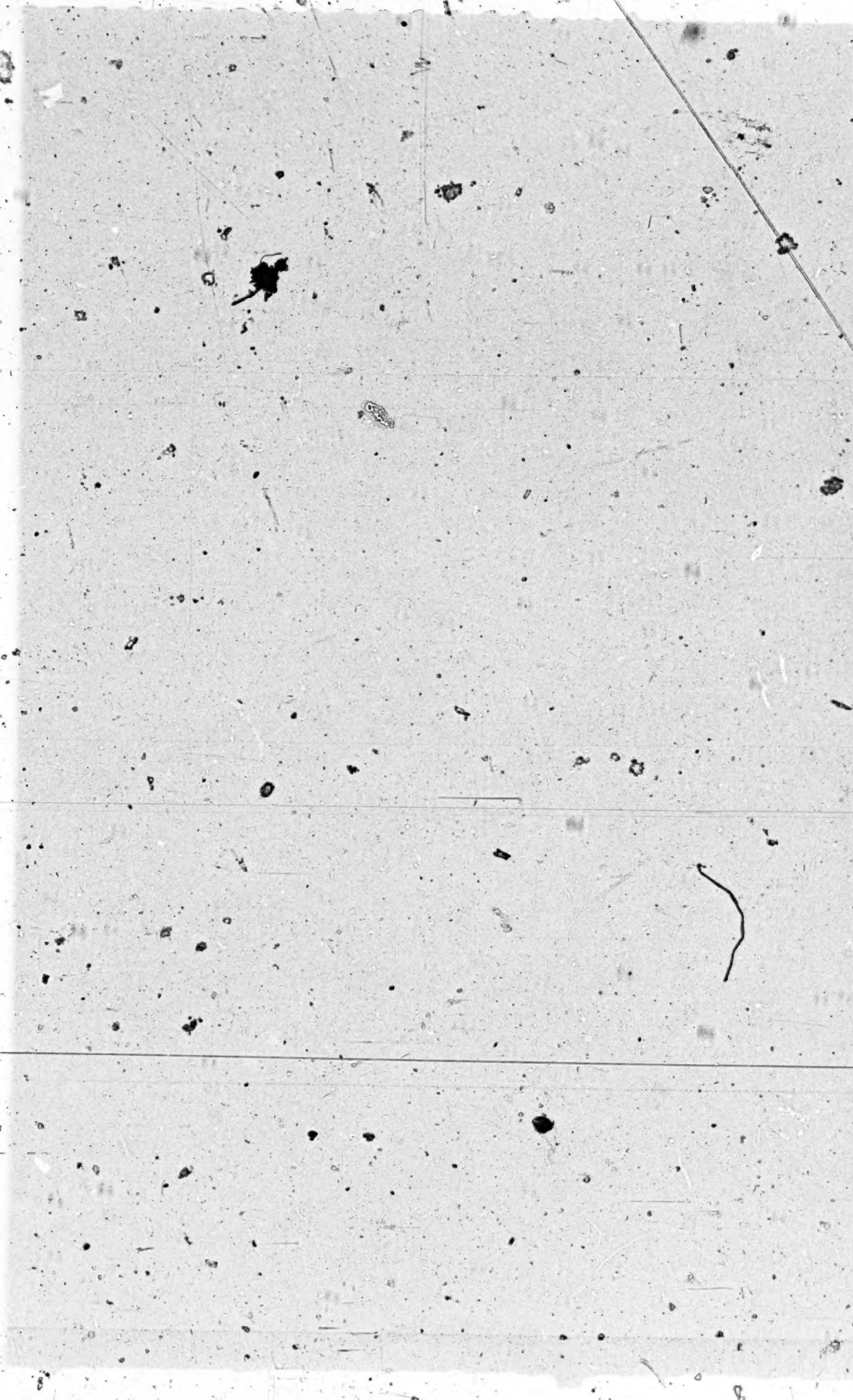
The Act of June 26, 1930 (46 Stat. 817, 5 U. S. C. 43) reads as follows:

There is authorized to be employed in each executive department, independent establishment, and the municipal government of the District of Columbia, for services in the District of Columbia or elsewhere, such number of employees of the various classes recognized by [the Classification Act of 1923, as amended (5 U. S. C., ch. 13)] as may be appropriated for by Congress from year to year: *Provided*, That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment.

STATEMENT.

On March 23, 1948, petitioner brought suit against the United States in the District Court for the Middle District of Georgia to recover overtime compensation. Petitioner was employed as a civilian fire fighter in the "field service" of the War Department. There was no statute creating the position in which he was employed, his employment being under the omnibus authorization of the Act of June 26, 1930 (46 Stat. 817, 5 U. S. C. 43) authorizing the employment of "such number of employees of the various classes recognized by [the Classification Act of 1923] as may be appropriated for by Congress from year to year." His appointment was not made, nor was it required to be made, by the "head of the department" in which he was employed, but by the commanding officer of Camp Wheeler, Georgia, pursuant to the proviso in 5 U. S. C. 43, *supra*, permitting delegation to "subordinates" of power to employ persons for duty in the "field services" of any department or establishment.

Both the District Court and the Court of Appeals, on appeal, held that petitioner was an "officer of the United States" so as to be precluded from suing in the District Court by 28 U. S. C. 1346(d)(2). Certriorari was sought because of conflict with *Beal* v. *United States*, *supra*, decided by the Court of Appeals for the Sixth Circuit.



SUMMARY OF ARGUMENT.

I. The term, "officer of the United States", as used in the Act of June 27, 1898 (30 Stat. 494) and as codified successively in Sec. 24(20) of the 1911 Judicial Code and Sec. 1346(d)(2) of the 1948 Judicial Code, does not include all government civil servants but only those who are "officers" in the constitutional sense.

(a) 28 U. S. C. 1346(d)(2), a subsection of the Judicial Code of 1948, was derived from Sec. 24(20) of the Judicial Code of 1911, which in turn was derived from Sec. 2 of the Act of June 27, 1898, which amended the Tucker Act by excluding from the district courts suits for salary claims brought by "officers of the United States". When the 1898 amendment was enacted, this Court had already construed statutory references to "officers of the United States" as meaning only those persons whose appointments were authorized by Congress in accordance with Art. II, Sec. 2, Clause 2 of the Constitution. *United States* v. *Germaine*, 99 U. S. 508 (1879); *United States* v. *Mouat*, 124 U. S. 303 (1888); and *United States* v. *Smith*, 124 U. S. 525 (1888). Only where the court found an unmistakable intention to cover other employees, did it construe the term more broadly. Cf. *United States* v. *Hendee*, 124 U. S. 309.

(b) Inasmuch as the phrase "officer of the United States" had a well-established meaning at the time of the enactment of the Act of June 27, 1898, that meaning should be accorded to it in construing the statute unless Congress has clearly manifested a contrary intention. *Case* v. *Los Angeles Lumber Products Company*, 308 U. S. 106, 115.

Nothing in the legislative history of the 1898 amendment indicates any intention on the part of Congress to use the words "officers of the United States" in that statute in a sense different than had previously been accorded them by the Courts. To the contrary, the debates on the bill (Cong. Rec. 55th Cong., 2d Sess., pp. 1731, 1732) and the report

of the House Judiciary Committe (H. R. Rep. No. 325, 55th Cong., 2d Sess.) indicate that the principal purpose of the act was to remove from the jurisdiction of the District Courts not suits for salary claims brought by *all* federal employees but only those brought by those who had a salary of $2,500 per annum or more. In those days of low salaries, only those members of the federal service who held positions of great dignity and were clearly "officers of the United States" in the constitutional sense commanded salaries in so high a bracket. Act of July 31, 1894 (28 Stat. 162).

(c) Beginning with *United States* v. *McCrory*, 91 Fed. 295 (CCA 5, 1899), virtually *every* court considering the 1898 amendment has construed the words "officers of the United States" in accordance with the decisions of this Court cited above in (a). Even the Court of Appeals for the Fifth Circuit has conceded that the test of whether the statute applied was whether the employee was an officer in the constitutional sense (*Kennedy* v. *United States*, 146 F. 2d 26 (1944)), the only issue between that court and the Court of Appeals for the Sixth Circuit being in the application of that test.

(d) In view of this consistent judicial interpretation of the June 27, 1898, amendment as applying only to officers in the constitutional sense, Congress must be presumed to have adopted that meaning in both the 1911 and 1948 Codifications of the Judicial Code, both of which retained the identical phrase "officers of the United States". *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115; *Keck* v. *United States*, 172 U. S. 434, 457. Such presumption is especially compelling as to the 1948 Codification since in contemporaneous revisions of sections of the criminal code, the phrase "officers of the United States" was changed to read "officers *or employees of the United States*", so as to "clarify" or "broaden the scope" of those sections. Cf. 18 U. S. C. 201, 203, 214, 215, 216, 654.

II. *The accepted tests of whether a particular civil servant is an officer in the constitutional sense are* (a) *whether Congress provided that he be appointed by the President, a head of a Department; or a Court of Law, and* (b) *whether the position to which he is appointed was specifically created by statute. Under either of these tests, petitioner was not an officer in the constitutional sense.*

In determining who is an officer in the constitutional sense in construing 28 U. S. C. 1346(d)(2) and other statutes, the courts have not attempted to draw the line on the basis of the importance of the duties to be performed or the qualifications of the employee. Instead, they have accepted either (a) the decision of Congress to vest appointments in subordinate officials (*United States* v. *Germaine*, supra; *United States* v. *Smith*, supra); or (b) the failure of Congress to specifically create the position to which the person is appointed (*Burnap* v. *United States*, 252 U. S. 512; *Martin* v. *United States*, 168 Fed. 198 (CCA 8, 1909); *Cain* v. *United States*, 73 F. Supp. 1019 (D. C. Ill. 1947); *Beal* v. *United States*, 182 F. 2d 565 (CCA 6, 1950)) as a conclusive legislative determination that the appointee was not an officer in the constitutional sense. By either of these tests, petitioner was clearly not an officer within the meaning of the statute.

III. *Even aside from these traditional tests and considering the nature of his position and duties and the scope of his authority, petitioner was clearly not an "officer of the United States" either within Art. II, Sec. 2, Cl. 2 of the Constitution or in the commonly accepted meaning of the term.*

This Court has never had occasion to look behind the decision of Congress authorizing appointments by subordinate officials so as to determine where the line should be drawn between those civil servants who, because they are "inferior officers", may only be appointed in the manner

prescribed by Art. II, Sec. 2, Clause 2 of the Constitution, and those who may be appointed by subordinates. In two early opinions, the Attorney General stated that, because Inspectors of Customs and Assistant Assessors were federal "officers" in the constitutional sense, statutes which purported to vest in subordinate officials the power to appoint to such positions were unconstitutional. 4 Op. Atty. Gen. 162 (1843); 11 Op. Atty. Gen. 209 (1865). On the other hand it seems clear that "window cleaners, scrub women, elevator boys, door keepers" need not be appointed by department heads. Cf. *Krichman* v. *United States*, 256 U. S. 363. Regardless of where the line may be drawn, petitioner was certainly not performing such duties or vested with such authority as to require this Court to find that he was an officer in either the constitutional or the commonly accepted sense. *Martin* v. *United States*, *supra*; *Cain* v. *United States*, *supra*. Hence, even disregarding the traditional tests, petitioner was not so clearly an officer of the United States as to preclude him from suing in the District Courts.

IV. *Sec. 50 of Public Law 248 is not applicable to this or other pending cases.*

To apply Sec. 50(b) to pending cases will compel some litigants to start afresh in the Court of Claims and leave others, as to whom the Statute of Limitations has run, *with no forum at all* in which to enforce rights otherwise within the scope of the Fifth Amendment. Cf. *Lynch* v. *United States*, 292 U. S. 571. Such intention is not to be imputed to Congress, unless no other interpretation is possible. *Sorrells* v. *United States*, 287 U. S. 435, 448. Cf. *Duke Power Company* v. *South Carolina Tax Commission*, 81 F. 2d 513, 517 (CCA 4).

(a) In situations comparable to this, this Court has held that even a procedural statute will not be construed as affecting pending cases unless the nature of the statute, its legislative history, or the language used *unequivocally* re-

quire such construction. *Twenty Per Cent Cases*, 87 U. S. (20 Wall.) 179; *United States* v. *St. Louis, San Francisco and Texas Ry. Co.*, 270 U. S. 1.

(b) Normally, the absence of a saving clause raises an inference that a statute is affirmatively intended to withdraw jurisdiction as to pending as well as future cases. Here, the legislative history of Sec. 50(b) rebuts any such inference. The section was considered as merely "clarifying and corrective". Accordingly there was no occasion for including, or considering the inclusion of, a saving clause and hence no inference can be drawn from its absence that Congress must affirmatively have intended to affect pending litigation.

(c) The language of Sec. 50(b) of Public Law 248 does not unequivocally refer to pending actions. A Congressional intent to apply this statute to pending cases need not be implied by reading the words "any actions" as necessarily encompassing pending as well as future actions. *United States* v. *St. Louis, San Francisco and Texas Ry. Co., supra;* and see *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 287.

(d) Prior decisions of the Court applying other procedural statutes to pending as well as future cases are distinguishable from the case at bar as either containing explicit retroactive language or involving policy objectives from which such retroactive application could be fairly implied. *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23; *United States* v. *Schooner Peggy*, 5 U. S. (1 Cranch) 103; cf. *Smallwood* v. *Gallardo*, 275 U. S. 56. No such policy considerations are apparent in the case at bar. Decisions such as *United States* v. *McCrory*, 91 Fed. 295, are questionable, and demonstrate the wisdom of the rule of *United States* v. *St. Louis, San Francisco and Texas Ry. Co., supra.*

ARGUMENT.

I.

THE TERM "OFFICER OF THE UNITED STATES", AS USED IN THE ACT OF JUNE 27, 1898 (30 STAT. 494) AND AS CODIFIED SUCCESSIVELY IN SEC. 24(20) OF THE 1911 JUDICIAL CODE AND SEC. 1346(d)(2) OF THE 1948 JUDICIAL CODE, DOES NOT INCLUDE ALL GOVERNMENT CIVIL SERVANTS BUT ONLY THOSE WHO ARE "OFFICERS" IN THE CONSTITUTIONAL SENSE.

28 U. S. C. 1346(d)(2), a subsection of the Judicial Code of 1948, was derived from Sec. 24(20) of the Judicial Code of 1911, which in turn was derived from Sec. 2 of the Act of June 27, 1898, which amended the Tucker Act by excluding from the district courts suits for salary claims brought by "officers of the United States".

That these successive statutes each used the term "officers of the United States" in a limited sense is clear from the following discussion.

(a) *By June 27, 1898, when the Tucker Act was amended, the term "officer of the United States" had acquired a special and well-accepted meaning.*

It is a "familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they were used in that sense *unless the context requires* the contrary".* *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115; *United States* v. *Stewart*, 311 U. S. 60, 63. That the term "officer of the United States" did have such well known meaning when the Tucker Act was amended by the Act of June 27, 1898, is clear from a series of Supreme Court decisions which preceded the enactment of the amendment.

In *United States* v. *Germaine*, 99 U. S. 508, Germaine, a

* Emphasis supplied. All emphasis herein supplied unless otherwise indicated.

surgeon working for the Commissioner of Pensions, was indicted under § 12 of the Act of 1825 (4 Stat. 118) imposing penalties upon "every officer of the United States" who was guilty of extortion. The Commissioner of Pensions was then "in the Department of Interior" (R. S. 1873, § 470), charged with performing his duties "under the direction of the Secretary of the Interior". (R. S. 1873, § 471). Germaine was appointed under an act providing "that the Commissioner of Pensions * * * is * * * authorized to appoint * * * civil surgeons".

The Supreme Court held the indictment demurrable on the grounds that (1) from the nature of Germaine's employment, and (2) *from the fact that his appointment had been authorized by Congress to be made by the Commissioner of Pensions*, he was not an "officer". With respect to this second ground of decision, the Court said:

> "The Constitution, for purposes of appointment, very clearly divides all its offices into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But, foreseeing that when offices become numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of the departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. * * * It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish anyone not appointed in one of these modes. *If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the Government; and this has been done where it was so intended,* as in the 16th section

> of the Act of 1846,[3] concerning embezzlement, by which any officer or agent of the United States, and all persons participating in the act are made liable. 9 Stat. at L. 59." (99 U. S. 508 at pp. 509, 510.)

The same view was taken in *United States* v. *Mouat*, 124 U. S. 303. Mouat was a paymaster's clerk appointed by a Navy paymaster *by delegation of authority from the Secretary of the Navy.* He sued for a mileage allowance under the Act of June 30, 1876, allowing such mileage to "officers of the Navy". The court again held that, in the absence of evidence of a different legislative intent, the quoted words would be limited to officers as defined by the Constitution, and since Mouat had not been appointed by the Secretary of the Navy he was not an "officer" within the meaning of the statute. The Court, citing *United States* v. *Germaine, supra,* said:

> "Unless a person in the service of the Government * * * holds his place by virtue of an appointment by the President, or by one of the courts of justice or heads of department authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." (124 U. S. 303 at p. 307.)

Again, in *United States* v. *Smith*, 124 U. S. 525, a clerk in the office of a collector of customs was appointed pursuant to Sec. 2634 of the Revised Statutes of 1873 providing that "the Secretary of the Treasury may, from time to time * * * limit and fix the number and compensation of the clerks to be employed by any collector * * *". He was indicted for violating Sec. 3639 of the Revised Statutes requiring the safe keeping of funds by certain enumerated officials "and all public officers of whatsoever character". The Court held that the indictment should be dismissed on

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[3] See, also, act of August 5, 1882, ch. 389, Sec. 4 (22 Stat. 255): "No civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer or their employees, shall be employed * * * except for services actually render * * *"

the grounds that the term *officer* applied only to officers in the constitutional sense. The Court said:

> "A clerk of the collector is not an officer of the United States within the provisions of this section; and it is only to persons of that rank that the term public officer, as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States* v. *Germaine*, 99 U. S. 508; and in the recent case of *United States* v. *Mouat*, 124 U. S. 303. (124 U. S. 525 at p. 532.)

In the only case prior to 1898 giving the term "officer" a broader meaning, *United States* v. *Hendee*, 124 U. S. 309, there was a clear intention by Congress to use the term in other than its constitutional meaning. In that case, plaintiff sued for pay benefits under a statute providing that "officers of the Navy" shall be credited with time "served as officers *or enlisted men*", the court held that time served by plaintiff as a paymaster's clerk should be included, on the ground that

> "the expression '*officers or enlisted men*' is not to be construed distributively as requiring that a person should be an enlisted man, or an officer nominated and appointed by the President, or by the Head of a Department, but that it was intended to cover all men in service, either by enlistment or regular appointment * * * ". (124 U. S. 309 at p. 313.)

In reaching this result, the court recognized that *normally* the term "officer" would be construed in its constitutional meaning, and a month later so construed a criminal statute in *United States* v. *Smith*, *supra*.

(b) *Nothing in the legislative history of the Act of June 27, 1898, required giving the words "officers of the United States" a scope broader than their usual meaning.*

The legislative history of the Act of June 27, 1898, while inconclusive, indicates, if anything, that the jurisdiction of the district court was being removed only as to the claims of officers in the constitutional sense adopted in the *Mouat, Germaine* and *Smith* cases, *supra.*

The chief occasion for the Amendment appears to have been difficulties encountered in enforcing the Act of July 1, 1894, Ch. 174, Sec. 2, of the Laws of the 53rd Congress (28 Stat. 162, 205), which provided:

> "No person who holds an office the salary or annual compensation attached to which amounts to the sum of $2,500 shall be appointed to or hold other office to which compensation is attached unless specifically heretofore or hereafter specifically authorized thereto by law."

This provision has been to some extent thwarted by the practice, described in the House debate on the proposed 1898 amendment to the Tucker Act, as follows:

> "Under the law of July 31, 1894, it is provided that no person who holds a $2,500 office can hold another compensated office under the United States. Now in a district * * * a person holds the office of clerk of the Court of Appeals and the same person holds the office of clerk of the Circuit Court of the United States, each of them paying a salary amounting to or exceeding $2,500. This person draws, in the regular way, his salary of $2,500 for one of the offices. Then he brings suit against the United States every quarter for a sum less than $1,000. Sometimes the cases are not properly defended, the department here having no notice of them. This man obtains a judgment for less than $1,000 every three months from which judgment there

is no appeal to the Supreme Court. Thus, he violates the law of 1894 and draws the pay of two officers, each of them exceeding $2,500."[4]

This practice was cited as the dominant reason for the amendment in the report of the House Judiciary Committee.[5] So eager was the Treasury Department, which was promoting the legislation, to reduce the prosecution of these and perhaps other illegal claims to uniformity that the bill, as introduced, proposed to withdraw completely the jurisdiction of the district courts over claims against the United States, by repealing Section 2 of the Tucker Act in its entirety.[6] The House Judiciary Committee, however, reported the bill back to the House, recommending that jurisdiction of the district courts be withdrawn only as to compensation claims of "officers of the United States".[7]

This appears to be the explanation of why Congress in this amendment confined to a single forum, not the claims of *all* federal employees, but only the claims of "officers of the United States", who in those days of modest salaries, were the very persons on the federal payroll who came within the $2,500 ban of the Act of July 1, 1894.

It must be recalled that this Act of 1894 was primarily an appropriation act. Its prohibition against the drawing of double salaries can thus be read in context with the rest of the Act, thereby removing any doubt as to the classes or categories of public servants to which it was intended to apply. Significantly, the line of demarcation drawn at the $2,500 level actually divided the great mass of Government employees *at that time* from those who would

[4] Mr. Updegraff, in presenting the 1898 amendment to the House. Cong. Rec. 55th Cong., 2nd Sess., p. 1731.

[5] H. R. Rep. No. 325, 55th Cong., 2d Sess.

[6] Cong. Rec. 55th Cong., 2nd Sess., p. 1731.

[7] *Ibid*, p. 1782.

normally have been considered to be "officers of the United States", in the constitutional sense.[8]

It would thus seem that the purpose of the 1898 amendment was to oust the district courts of jurisdiction only as to suits for compensation brought by the higher paid Government servants, leaving intact their original Tucker Act jurisdiction over similar claims of its more humble personnel. If this was the legislative objective, then the use of the narrow term "officers of the United States" was appropriate to effect the desired result.

In any event, there is certainly no such affirmative expression of a desire to cover all federal employees so as to justify reading the term "officers of the United States" in a sense other than the one adopted by this Court in its prior decisions (discussed in (a) above) *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115.

(c) Virtually every case construing the Act of June 27, 1898, has interpreted the term "officer of the United States" as meaning an officer in the constitutional sense of the term.

Beginning with *United States* v. *McCrory*, 91 Fed. 295, decided within a year after the amendment of 1898, virtu-

[8] The following examples are sufficient to illustrate the point:

Salaries in the Department of State. Secretary of State, $8,000; First Assistant Secretary of State, $4,500; Second and Third Assistant Secretaries of State, $3,500; Chief Clerk, $2,500. All other salaries were under $2,500.

Salaries in the War Department. Secretary of War, $8,000; Assistant Secretary of War, $4,500; Chief Clerk, $2,500. All other salaries under $2,500.

The appropriations for the Office of Architect of the Capitol (28 Stat. at p. 197), Office of the Director of the Geological Survey (*Ibid*) and the Post Office Department (28 Stat. at p. 199) all reflect the same pattern of an administrative official with a salary in excess of $2,500, and skilled, fiscal or clerical help with salaries below that figure.

The groups holding positions in the War Department analogous to those of these plaintiffs were, for illustration, as follows: Captain of the Watch, $1,200; Lieutenants of the Watch, $840 each; 28 Firemen, $720 each.

ally every district and circuit court which has construed the amendment has agreed that its provisions applied only to "constitutional officers." The only divergence of viewpoint has been in ascertaining the precise scope of the concept of a "constitutional officer."

Petitioner has rather fully discussed the various cases on Pages 11 through 13 of his brief. An excellent summary of the cases will also be found in *Cain* v. *United States*, 73 F. Supp. 1019, 1020.[9]

Even the Court of Appeals for the Fifth Circuit, in *Kennedy* v. *United States*, 146 F. 2d 26, quoted with approval its prior opinion in *United States* v. *McCrary*, *supra*, that only a person appointed in the constitutional mode was "an officer of the United States" within the meaning of the 1898 Amendment. The court departed from earlier decisions only in its apparent holding that an appointment pursuant to a delegation of authority was tantamount to an appointment by the head of a department himself, and in ignoring the requirement in *Burnap* v.

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[9] "The courts seem universally to have held that the limitation of jurisdiction under the Tucker Act applies to those claimants who are 'officers of the United States' within the meaning of Article 2, Section 2, Clause 2 of the Constitution of the United States."

See also, *Brooks* v. *United States*, 36 F. Supp., 68, 69 (D. C. N. Y., 1939), the only opinion on this question which evidences any consideration of the legislative history of this amendment, where the court said:

> "It is most improbable that, with a well accepted constitutional meaning of 'officers of the United States'; Congress ever intended a different meaning to that phrase which would permit varying departmental meanings of the word 'officer' to affect the meaning of a statute of general application. Wherever the courts have departed from the constitutional meaning of the words, they have done so only because the clear meaning of the statute was the impelling force in reaching a broader definition, or because the words in question were 'officer', 'civil officer,' etc., and not 'officer of the United States.' Viewed against this background, all of the cases cited by the government are readily distinguishable."

United States, 252 U. S. 512, that the position to which the appointment was made had to be created by a specific act of Congress.

(d) Congress must be presumed to have adopted the previous judicial interpretation of the Act of June 27, 1898, when, in the 1948 revision of the Code of Civil Procedure, it retained the identical phraseology of "officers of the United States."

Under the doctrine of *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, Congress must be presumed to have used the term "officers of the United States" in the 1948 revision of 28 U. S. C. 1346(d)(2) in the accepted meaning of that phrase as adopted by the courts both *before* and *after* the 1898 amendment.

This inference is especially compelling since, in contemporaneous revisions of the Criminal Code, as to which a similar problem had arisen, it amended the phrase "officers of the United States" to read "officers *or employees* of the United States" and "office" to "office or place."

Thus, in the 1948 Revision of the Criminal Code, old 18 U. S. C. 149, 150 and 151, which had punished the solicitation of money for the procurement of an appointive "office", was revised to read "office or place" in Revised 18 U. S. C. 214 and 215. The Revisers' Note states that this was "to give broader scope to the section." Likewise, old 18 U. S. C. 202 prohibiting the procurement of contracts by any "officer or agent" was revised to read "officer, *employee*, or agent", in Revised 18 U. S. C. 216. The Revisers' Note states that this change was for the purpose of "clarifying scope of section." 18 U. S. C. Congressional Service (Temp. Ed., 1948, West Pub. Co.) p. 2465.

Similarly, former 18 U. S. C. 91 and 207 covering bribery of any "officer" was revised to read "officer or employee" in Revised 18 U. S. C. 201; former 18 U. S. C. 198, prohibiting the prosecution of claims by "an officer" was

revised to cover "an officer or employee" in Revised 18 U. S. C. 283; former 18 U. S. C. 183 prohibiting embezzlement by "any officer or assistant to such officer" was revised to read "an officer or employee" in Revised 18 U. S. C. 654; the Revisers' Note again stating that the change was in order to "clarify scope of section." (*Ibid.* at p. 2509.)

These changes in the criminal code, in contrast to the continued reference in 28 U. S. C. 1346(d)(2) only to "officers", reinforces the usual presumption that "the re-enactment without change of phraseology, by implication, carried the previous interpretation and practice with it." *Keck* v. *United States*, 172 U. S. 434, 457.

II.

THE ACCEPTED TESTS OF WHETHER A PARTICULAR CIVIL SERVANT IS AN OFFICER IN THE CONSTITUTIONAL SENSE ARE (*a*) WHETHER CONGRESS PROVIDED THAT HE BE APPOINTED BY THE PRESIDENT, A HEAD OF A DEPARTMENT, OR A COURT OF LAW, AND (*b*) WHETHER THE POSITION TO WHICH HE IS APPOINTED WAS SPECIFICALLY CREATED BY STATUTE. UNDER EITHER OF THESE TESTS, PETITIONER WAS NOT AN OFFICER IN THE CONSTITUTIONAL SENSE.

In determining who is an officer in the constitutional sense, in construing 28 U. S. C. 1346(d)(2) and other statutes, the courts have not attempted to draw the line on the basis of the importance of the duties to be performed or the qualifications of the employee. Instead, they have accepted either

(*a*) the decision of Congress to vest the appointive power in subordinate officials (*United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Smith*, 124 U. S. 525);[10] or

(*b*) the failure of Congress to specifically create the position to which the person is appointed (*Burnap* v.

[10] Discussed *supra* at pp. 10 through 13.

United States, 252 U. S. 512; *Martin* v. *United States*, 168 Fed. 198; *Cain* v. *United States*, 73 F. Supp. 1019; *Beal* v. *United States*, 182 F. 2d 565).[10a]

as a conclusive legislative determination that the appointee was not an officer in the constitutional sense.

These tests have been so consistently recognized and applied in construing the 1898 Amendment to the Tucker Act, that they must be deemed to have been adopted by Congress in the successive codification of 1911 and 1948 (discussed *supra*, pages 18, 19).

There remains the question of whether petitioner is an officer under either of these established criteria.

> *(a) For the purpose of determining who is an officer of the United States, an appointment by delegation from the Head of a Department is not tantamount to an appointment by the Head of Department himself.*

There is, of course, no issue here as to the practical need for permitting heads of departments to delegate to subordinates in the field the authority to appoint minor civil service employees, or the practical impossibility of Congress specifically creating all the hundreds of thousands of minor positions in the civil service.

These two practical problems are, however, no new development. 5 U. S. C. 43, under which petitioner was hired, originally appeared as § 169 of the Revised Statutes of 1873, which gave the head of each department omnibus authority:

> "to employ . . . such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers and *other employees;* and at such rates of compensation, as may be appropriated for by Congress from year to year."

[10a] Discussed *infra* at pp. 22 through 26.

and delegations of the appointing power over minor employees have been long exercised and permitted. See *United States* v. *Mouat*, 124 U. S. 303; *Morrison* v. *United States*, 40 F. 2d 286 (D. C. N. Y. 1930); *Brooks* v. *United States*, 33 F. Supp. 68.

The issue, in short, is not the broad practical impossibility of Congress specifically creating every position, no matter how minor, nor the practical need for delegating the appointing power to such positions, but rather "a technical rule of procedure to be applied as such" (Cf. *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132, 136) namely, whether employees who are appointed by subordinate officials to positions not specifically created by Congress, are excluded from suing in the district courts as "officers of the United States."

Here, the petitioner was admittedly not appointed by the head of his department, nor even by an immediate assistant or bureau head. He was appointed by a commanding officer in the field.

The Court below presumably thought that, on some principle akin to the law of agency, the appointment, being under a delegation of authority *from* the Head of department was action *by* the Head of the department. But, for purposes of deciding who is an "officer of the United States", there is no rational basis for distinguishing a *direct* delegation by Congress of appointing power to a subordinate official from an *indirect* delegation to the same official through the department head. In both cases, we have the judgment of Congress that the position was not of such importance as to justify requiring appointments thereto to be made by the department head.

It is no answer to argue that, because a department head can instruct and supervise the subordinate to whom he delegates appointive power, such subordinate is really his alter ego and an appointment made by the subordinate thus becomes the act of the department head. For the

department head has the same power to instruct and supervise a subordinate to whom Congress directly delegates an appointive power, and that power of supervision, even *when actually exercised*, has consistently been held insufficient to constitute the appointee an officer.[11]

Accordingly, the courts have correctly treated both situations alike, and held that persons appointed by subordinates under delegation from department heads are in the same category as appointees under direct delegation from Congress, and are not officers in the constitutional sense.[12]

Thus, under the first test—viz., whether his appointment was required by Congress to be made by the Head of his department—petitioner was clearly not "an officer of the United States."

(b) There was no statute specifically creating the office to which petitioner was appointed.

The Court of Appeals for the Sixth Circuit, in *Beal* v. *United States*, 182 F. 2d 565, deemed it unnecessary to consider the first test (discussed in *(a)* above), holding that regardless of how the appointive power was vested, plaintiffs, there, were not "officers" of the United States since there was no statute specifically creating their positions.

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[11] Thus in *United States* v. *Mouat*, a clerk appointed by a paymaster was held not an officer even though the appointee was actually approved by the Secretary of the Navy, since "there was no act requiring his approval of such an appointment", 124 U. S. 303 at pp. 307, 308. So, in *United States* v. *Smith*, a customs clerk appointed by a collector was held not an officer even though the appointment was approved by the Secretary of the Treasury because "no law *required* such approbation", 124 U. S. 525, at p. 533. And, in *Burnap* v. *United States*, infra, the Court held that a landscape architect actually appointed by the Secretary of War was not an officer when the appointive power was vested by Congress in the Chief of Engineers, 252 U. S. 512, at pp. 515, 516 and 518.

[12] *Morrison* v. *United States*, 40 F. 2d 286; *Brooks* v. *United States*, 33 F. Supp. 68; *Beal* v. *United States*, 182 F. 2d 565.

The plaintiffs in the Beal case, like the petitioner here, were appointed under the omnibus authority of 5 USCA 43, which, for convenience, we here repeat in full: (5 USCA, 1949 Cum. Supp., p. 24)

> "*Employment of clerks, and other employees; authority; place of service; delegation of authority to employ.* There is authorized to be employed in each executive department, independent establishment, and the municipal government of the District of Columbia, for services in the District of Columbia or elsewhere, such number of employees of the various classes recognized by sections 661-663, 664-669, 670-672, 673, and 674 of this title, as may be appropriated for by Congress from year to year: *Provided*, that the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment."

Similarly, petitioner here, like the appellants in *Beal* v. *United States, supra,* was paid under the War Department Appropriation Acts which merely authorized lump sum expenditures for various purposes and made no specific provision for his particular wages as distinguished from those of the hundreds of thousands of other civilian employees of the department.[13] That Congress created no office of "firefighter" in any other legislation is evident from the fact that nowhere in the statutes are they referred to by name, nowhere are their duties prescribed and nowhere was any specific authorization made for their pay. Consequently, unless statutory "creation" of an office can be found in the two statutes above referred to (5 USCA

[13] The Military Appropriation Act of 1943 (P. L. 649-77th Cong.) provided the lump sum of $2,617,506,025 for a long list of Signal Corps requirements, including "salaries of civilian employees"; the Military Appropriation Act of 1944 (P. L. 108-78th Cong.) provided $4,646,169,000 for the same purposes.

43 and the Appropriations Acts) it will not be possible to classify petitioner as an "officer of the United States."

The question was considered in this light in the case of *Martin* v. *United States*, 168 Fed. 198 (CCA 8, 1908), in a long and well reasoned opinion by Judge Sanborn. Martin was a clerk working for the Commissioner to the Five Civilized Tribes; his appointment had been made in the lower echelons of the Department of the Interior, but approved by the Secretary. Subsequently he was tried and convicted of violating a statute which applied only to "Every officer . . ."

Martin's appointment had been made under an appropriations act, similar in effect to 5 USCA 43, *supra*, authorizing the employment by the Secretary of "all assistance necessary for the prompt and efficient performance" of the duties of the Indian commissioners. (Act of March 3, 1905, c. 1479, 33 Stat. 1060.) Considering the effect of this statute, Judge Sanborn said:

> ". . . when the Secretary of the Interior approved the defendant's employment in common with that of the other employes of the commissioner, he labored under no misapprehension, and did not undertake to create an office for the defendant or to approve his appointment to one . . .
>
> "And because the defendant's services were secured under authority granted to the Secretary to employ assistance, *because his position was never made office by law . . . the defendant was not an officer of the United States.*" (168 Fed. 198 at p. 203)

This doctrine was reaffirmed by this Court in *Burnap* v. *U. S.*, 252 U. S. 512.

Burnap was the only landscape architect in the Office of Public Buildings and Grounds, a War Department agency. Revised Statutes, § 169,[14] from which 5 USC 43 was de-

[14] The significant portion of the text of § 169, Rev. Stat., appears at page 20, *supra*.

rived, empowered all heads of departments to employ such personnel as might be appropriated for by Congress from year to year, and only in the appropriations acts covering Burnap's salary was there any recital of his position and the emolument assigned to it. The court held that this was not the equivalent of the statutory creation of an office:

> "There is no statute," said Justice Brandeis, "which *creates an office* of landscape architect in the Office of Public Buildings and Grounds. . . The only authority for the appointment or employment of a landscape architect in that office is the legislative and judicial appropriations act." (252 U. S., 512 at p. 517)

Burnap was held not to be an officer.

From the foregoing decisions, three propositions of law are clear:

1. No Federal position can rise to the dignity of an office unless there is a statute specifically creating that office;

2. An annual appropriations act which does not purport to create an office, but merely appropriates funds for a named position, will not constitute the incumbent of that position an officer in the constitutional sense;

3. *A fortiori*, a general appropriations act (such as is here involved) which merely appropriates lump sums for "civilian employees", without even referring to one or more specific positions, certainly cannot create an office in the constitutional sense.

This test was applied in construing the 1898 Amendment to the Tucker Act in *Cain* v. *United States*, 73 F. Supp. 1019. That was an action brought under the Tucker Act by a former secretary to Justice Minton. Citing the *Bur-*

nap case, the District Court held that it had jurisdiction, and said:

> "... before an 'officer' may be appointed, Congress must have, by specific legislation created such 'office' ...
>
> "In the instant case, the only authority for the appointment of secretaries to circuit and district judges is found in the annual appropriation acts passed by Congress, but these appropriation acts nowhere *create the office* of secretary to which this plaintiff might have been appointed and thus have become an 'officer of the United States.'" (73 F. Supp. 1019 at p. 102.)

This test was relied on by the Court of Appeals for the Sixth Circuit, in *Beal* v. *United States*, 182 F. 2d 565, and is, we believe, sound. Accordingly, the decision below was in error, even without regard to the first test discussed in part (a) above.

III.

EVEN ASIDE FROM THE ESTABLISHED TESTS, AND CONSIDERING THE NATURE OF HIS POSITION AND DUTIES, AND THE SCOPE OF HIS AUTHORITY, PETITIONER WAS CLEARLY NOT AN "OFFICER OF THE UNITED STATES" EITHER WITHIN ART. II, SEC. 2, CL. 2 OF THE CONSTITUTION, OR IN THE COMMONLY ACCEPTED MEANING OF THE TERM.

Except for the President and Vice-President, all members of the Civil Service of the Federal Government are appointive and fall into one of three categories: (1) Those who are appointed by the President "by and with the advice and consent of the Senate"; (2) "inferior officers" whose appointment Congress may vest by law "in the President alone, in the Courts of Law, or in the heads of departments" (Const. Art. II, Sec. 2, Cl. 2); and (3) *employees*, signifying all subordinate members of the Civil Service receiving appointment at the hands of officers who are not

specifically recognized by the Constitution as capable of being vested by Congress with the appointing power of "inferior officers". The first two categories are explicitly provided for in Art. II, Sec. 2, Cl. 2 of the Constitution. There is no explicit provision in the Constitution covering the third category of "employees" but, as already noted above, the validity of such appointments and the distinction between "officers" and other persons in Civil Service has been recognized by the Courts at least since 1879. *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Smith*, 124 U. S. 525; *Burnap* v. *United States*, 252 U. S. 512.

The narrower question of who are "inferior officers" whose appointment Congress may not constitutionally delegate to any one other than the President, a department head or the Courts has, apparently, never been presented to the Courts. It does appear, however, that it would be unconstitutional (as well as most unlikely) for Congress to vest the appointment of major policy-making subordinates such as bureau chiefs, solicitors, assistant secretaries and the like, other than in the President or the heads of departments. This was the opinion of the Attorney General, who ruled that, because Inspectors of Customs and Assistant Assessors were "officers" in the constitutional sense, Congress was prohibited by the Constitution from vesting the power to appoint to these positions in anyone other than the President, the Courts or heads of departments and that statutes purporting so to delegate the appointive power were unconstitutinoal. 4 Op. Atty. Gen. 162 (1843); 11 Op. Atty. Gen. 209 (1865).

Similar was the view expressed in 13 Op. Atty. Gen. 516 (1871), in which the Attorney General ruled unconstitutional a proposed requirement that an examining board be empowered to designate the persons whom the department heads should appoint to fill *all* of the positions in the Civil Service, no matter how important, without even giving the department heads discretion to make their selections from a

panel of alternative nominees approved by the Board. The rationale of the Attorney General in that opinion would seem sound:

> "Viewing the appointive power conferred in the Constitution as a substantial and not merely a nominal function, I cannot but believe that the judgment and will of the constitutional depository of that power should be exercised in every appointment. The power was lodged where it was, because the makers of the Constitution, after careful consideration, thought that *in no other depositaries of it could the judgment and the will to make proper appointments be found * * * the first need of the head of a Department is a body of capable and trusty assistants; therefore Congress may vest appointments in the heads of Departments* * * *." (13 Op. Atty. Gen., 516 at p. 519.)

The corollary and converse of this principle is that Congress *may* constitutionally vest in subordinates the appointment of minor civil servants whose limited functions clearly place them outside the concept of an "officer" in the constitutional sense. Thus, in *Krichman* v. *United States*, 256 U. S. 363, the Court reversed the conviction of a baggage porter of a railroad being operated by the United States for bribery under Sec. 39 of the Criminal Code (35 Stat. 1096), holding that he was neither an "officer of the United States" nor acting in an "official function". In his opinion, Mr. Justice Day remarked:

> "Not every person performing any service for the government, however humble, is embraced within the terms of the statute." (256 U. S. 363, at p. 366.)

For, said he, if the broad interpretation urged by the government were adopted:

> "Window cleaners, scrub women, elevator boys, door keepers, pages—in short, anyone employed by the United States to do anything—is included." (*Ibid*)

Although these comments were addressed to the meaning of the terms "officers" or persons performing "official functions" in a criminal statute, they would seem *a fortiori* relevant to the issue of who, in terms of the nature of their position and duties, are "inferior officers", within the meaning of Art. II, Sec. 2, Cl. 2 of the Constitution, so as to require their appointment by the President, the courts of law, or the heads of departments.

Viewed from this standpoint, the line between "officers" and employees becomes, of necessity, vague. In one of the few cases so considering the problem Judge Sanborn observed:

> "The line which separates officers from employees is shadowy, and possibly not susceptible of precise definition, but there are persons who are readily recognized as officers of the United States, and others who are easily perceived to be employees and not to be officers. The classes have certain characteristics which may well be considered in assigning any person to his proper class. *Greater importance, dignity, and independence mark the position of an officer than that of an employee.* The clerkship of the defendant was not characterized by much more importance, dignity or independence than the positions of the stenographers or the janitors or the other employees about him." (*Martin* v. *United States*, 168 Fed. 198, at p. 201.)

The duties of petitioner here were the circumscribed ones of responding to fire calls, extinguishing fires, cleaning fire-fighting equipment, and the like. Certainly, regardless of where the line may theoretically be drawn between "officers" and other employees, there can be little question that, even if the traditional tests discussed in (a) and (b) above were ignored, petitioner was not performing policy making, administrative or executive duties of such significance that Congress could not properly vest his appointment in a subordinate official and that, in the commonly accepted meaning of the term, as well as in the constitutional sense,

he could not be considered an "officer" of the Federal government.

IV.

SEC. 50(b) OF PUBLIC LAW IS NOT APPLICABLE TO THIS OR OTHER PENDING ACTIONS.

To apply Sec. 50 of Pub. Law 248 (65 Stat. 727) to cases already pending in the District Courts, or which, as here, are still to be tried, if remanded, would cause obvious hardships. Those plaintiffs, as to whom the statute of limitations has not yet run, would be compelled to start afresh in the Court of Claims; and the efforts, time and costs to parties, witnesses and the District Courts themselves would all have been wasted. Other plaintiffs, such as petitioner, as to whom the statute of limitations has now run, would be left with no forum whatever for the enforcement of rights otherwise within the scope of the Fifth Amendment. Cf. *Lynch* v. *United States*, 292 U. S. 571, 579; and *Duke Power Co.* v. *Tax Commission*, 81 F. 2d 513 (CCA 4).

An intention so to penalize claimants should not be ascribed to Congress unless it can be found in the legislative history or in unequivocal language in the statute.

As stated by *Lord Esher, M. R.*, in *Plumstead Board of Works* v. *Spackman*, L. R. 13 Q. B. 878, 887, approved and cited by this Court in *Sorrells* v. *United States*, 287 U. S. 435, 448, Note 7:

> "If there are no means of avoiding such an interpretation of the statute", (as will amount to a great hardship,) "a judge must come to the conclusion that the legislature *by inadvertence has committed an act of legislative injustice;* but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, *unless he is forced to come to a contrary conclusion,* he ought to assume that it is impossible that the legislature could have so intended."

(a) Even procedural statutes will not be applied to pending cases, so as to create unconstitutional or harsh results, unless such application is explicitly provided or necessarily implied.

In situations comparable to the present case, this Court has adopted the principle that amendatory statutes will not be construed as affecting pending cases (where this will impute to the legislature an intention to cause unconstitutional or harsh results) unless the wording of the statute *unequivocally* commands that construction, or that construction is *necessarily* implied from its legislative history or otherwise.

As this Court said in the *Twenty Per Cent Cases*, 87 U. S. (20 Wall.) 179, 187:

> "* * * no statute, *however positive its terms*, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied."

This principle has been applied not merely to statutes affecting substantive law[15] but also *to statutes governing procedure.*[16]

In *United States* v. *St. Louis, San Francisco, and Texas Ry. Co.*, 270 U. S. 1, the issue was whether a statute of limitations, *which had no saving clause*, should be applied retroactively to bar causes of action existing at the time of its passage. The Transportation Act 1920, Ch. 91 (41 Stat. 456) created a new three-year limitation period for actions previously subject only to a six-year period of limitations:

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[15] *Chew Heon* v. *United States*, 112 U. S. 536, 559; *Shwab* v. *Doyle*, 258 U. S. 529, 534; *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162, 163.

[16] *United States Fidelity and G. Co.* v. *United States*, 209 U. S. 306; *Fullerton-Krueger Lumber Co.* v. *Northern Pac. Ry. Co.*, 266 U. S. 435; and compare *Sohn* v. *Waterson*, 84 U. S. (17 Wall.) 596, and *Herrick* v. *Boquillas Land & Cattle Co.*, 200 U. S. 96, construing state statutes of limitations.

> "*All* actions at law by carriers * * * shall be begun within three years from the time the cause of action accrues and not after."

Plaintiffs had commenced suits against the government in the Court of Claims within six years, but more than three years, after the accrual of their causes of action and over three years after the passage of the 1920 statute. The government contended that under the all-inclusive wording of the 1920 statute, the new limitation period applied to claims which had arisen prior to its enactment. In rejecting this contention, this Court cited the general principle against applying statutes to cases pending at the time of their enactment, and said:

> "There is nothing in the langauge of [the new statute of limitations] or in any other provision of the act or its history, *which requires* us to hold that the three-year limitation applies, under any circumstances, to causes of action existing at the date of the act." (270 U. S. 1 at p. 3.)

This decision is controlling here, unless either the legislative history or the express language of Sec. 50 of Public Law 248 compels the Court to apply its provisions to pending cases.

(b) The legislative history of Section 50, Public Law 248, contains nothing requiring this Court to apply its provisions to pending cases, merely because of the absence of an explicit saving clause.

Normally, the absence of a saving clause raises an inference that a statute such as this was affirmatively intended to withdraw jurisdiction as to pending as well as to future actions. Cf. *Gates* v. *Osborn*, 76 U. S. (9 Wall.) 567. Here, the legislative history of Public Law 248 rebuts any such inference.

The legislative history of Sec. 50 of Public Law 248 is quite meager. No hearings were held on the bill (H. R.

3899), nor does it appear on whose recommendation the amendment to § 1346(d)(2) was included in Sec. 50(b). As to other amendments to the Judicial Code contained in the bill, recommendations had been made by the Committee on Revision of Criminal and Judicial Codes of the Judicial Conference of the United States and approved by that Conference. (H. R. Rep't. No. 462, 82d Cong., 1st Sess., May 15, 1951, pp. 10, 11, 15, discussing Sections 36, 39 and 52 of the H. R. 3899.)

Whether or not the Attorney General requested or reported on the amendment does not appear, but if he did, it does not affirmatively appear that the Committees were given to understand that the amendment represented a change in existing law which, if applied to pending litigation, would compel some litigants to start afresh in the Court of Claims and leave others with no forum whatever for enforcing rights otherwise within the scope of the Fifth Amendment. To the contrary, the House Report (No. 462, p. 14) and the Senate Report (No. 1030, p. 16) state merely that the amendment was intended

> "to make it *more clearly appear* that the jurisdiction of the district courts does not include actions or claims for fees, salary, or compensation of federal officers or employees,"

and the only floor discussion of the bill consisted entirely of the following colloquy:

> "Mr. Reed of Illinois. Mr. Speaker, reserving to object, am I correct in understanding that this bill *is merely clarifying and corrective* as to certain titles of the code, and *that in only one instance is there any substantive law involved*, and that is, as I recall, where an appeal is permitted from the District Court of Guam to the Ninth Circuit?
>
> Mr. Bryson (Floor Leader of the bill). That is true.
>
> Mr. Reed of Illinois. Mr. Speaker, I withdraw my reservation of objection." (Cong. Rec., 82d Cong., 1st Sess., 13945, 13946.)

From this legislative history it is clear that there was no affirmative expression of any expectation that a change of law was involved which, if applied to pending cases, would require some litigants to start afresh in the Court of Claims and leave others with no forum at all. The section was considered as merely "clarifying and corrective." Accordingly, there was no occasion for including, or considering the inclusion of, a saving clause, and hence, no inference can properly be drawn that, merely because no saving clause was included, Congress must affirmatively have intended to affect pending litigation.

The remaining question is whether, despite the foregoing legislative history, the language of Public Law 248 is *so unequivocal* as to *require* that the amendment be applied to pending actions.

(c) The language of Section 50(b), Public Law 248, does not unequivocally refer to pending actions.

The remaining question is whether a congressional intent to apply Sec. 50 of Public Law 248 to pending as well as to future actions must be implied from the use of the adjective "any" which modifies the noun "actions". Such universals as "any" will not, however, be given their all-inclusive meaning where the result is inequitable (*Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 287), unconstitutional (*Sohn* v. *Waterson*, 84 U. S. (17 Wall.) 596, 599) or otherwise unjust. (See cases cited *infra* notes 16, 17, 18 and 19). Especially is this true where, as here, to do so would cause conflict with the rule which raises a presumption against applying procedural statutes to cases already pending at the time of their enactment.

In this respect, the present case is indistinguishable from *United States* v. *St. Louis, San Francisco & Texas Railway Co., supra*. Here, the statute as amended purports, without any saving clause, to deny jurisdiction to the District Courts:

"of * * * *any* action or claim to recover compensation by * * * employees."

There, the statute, without any saving clause, imposed a three-year limitation on:

"*all* actions at law by carriers."

Thus both cases come within the settled principle that words such as "any",[17] "all,[18] "every,[19] etc.,[20] are not to be given universal scope where a more limited interpretation will avoid imputing to Congress an intention to create unconstitutional or patently unjust consequences.

(d) Other cases distinguished.

The government will doubtless[21] rely on either such decisions as *Carpenter* v. *Wabash Railway Co.*, 309 U. S. 23, and *Seese et al.* v. *Bethlehem Steel Co.*, 168 F. 2d 58 (CCA , 1948) or the line of cases represented by *United States* v. *Schooner Peggy*, 5 U. S. (1 Cranch.) 103; *Ex parte McCardle*, 74 U. S. (7 Wall.) 506; and *Smallwood* v. *Gallardo*, 275 U. S. 56.

In the first group of cases, the statutes explicitly purported to apply to pending suits. Thus, in *Carpenter* v. *Wabash Railway Co.*, *supra*, a statute giving priority to

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[17] "any", *United States* v. *Palmer*, 16 U. S. (3 Wheat.) 610 *United States* v. *Kirby*, 74 U. S. (7 Wall.) 482, 486; *Richardson* v. *Ainsa*, 218 U. S. 289, 297; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627.

[18] "all", *Jacobson* v. *Massachusetts*, 197 U. S. 11, 39; *Sohn* v. *Waterson*, supra.

[19] "*every*", *Lau Ou Bew* v. *United States*, 144 U. S. 47; *Foley Bros, Inc.* v. *Filardo*, *supra*.

[20] "of any kind", *Church of the Holy Trinity* v. *United States*, 143 U. S. 447, 462; "any thing else", *United States* v. *Graf Distilling Co.*, 208 U. S. 198; "whoever", *Baender* v. *Barnett*, 255 U. S. 224, 226.

[21] These cases were cited in the brief recently filed by the government in its appeal in United States v. Beal now pending in the Court of Appeals for the Sixth Circuit.

personal injury claims was applied to a pending reorganization proceeding because its provisions explicitly applied to any proceedings "now or hereafter pending in any court". Similarly, in *Seese et al.* v. *Bethlehem Steel Co., supra*, the statute withdrawing jurisdiction of the federal courts over portal to portal pay claims explicitly applied to any action "whether instituted *prior to, on or after* May 14, 1947".

In the second group of cases, the statute, though not explicitly referring to pending suits, was applied to them in order to effectuate what the court found to be the objective of Congress. Thus, in *United States* v. *Schooner Peggy supra*, a prize court condemnation was dismissed because of a subsequent Treaty calling for the restoration of captured property "not yet definitely condemned", the court finding that such dismissal was required in the national interest to further the "manifest purposes of the Treaty". So, in *Ex parte McCardle*, 74 U. S. (7 Wall.) 506, this court found that the Act repealing its appellate jurisdiction over habeas corpus proceedings was intended to be comprehensive and to include appeals already filed.

Smallwood v. *Gallardo, supra*, held that a pending equity suit, to enjoin the collection of taxes by the Puerto Rico government, should be dismissed because of a later Act of Congress prohibiting any such suit from being "maintained". In so ruling, the Court emphasized that such construction would

> "carry out the policy that it embodies of preventing the Island from having its revenue held up by injunction; a policy no less applicable to these suits than to those begun at a later day. * * *" (275 U. S. 56, at p. 61.)

The Court added that this result

> "does not leave the taxpayer without power to resist an unlawful tax, whatever the difficulties in the way of resisting it." (*Ibid* at p. 62.)

No such policy considerations are apparent in the case at bar.

The government, in its recent brief in Court of Appeals for the Sixth Circuit, also relies on *United States v. McCrory*, 91 Fed. 295, which construed the 1898 Amendment as applying to pending actions despite any explicit language in the statute requiring such application.

That decision, we submit, was questionable in the light of the rule of construction followed in *United States* v *St. Louis, San Francisco and Texas Ry. Co., supra.* Indeed, the net effect of *United States* v. *McCrory* was needlessly to compel Congress to pass a remedial statute (Act of February 26, 1900, c. 25, 31 Stat. 33) specifically preserving suits when the 1898 Amendment was passed, thus specifying the intention not to affect pending cases which the Courts could—and should—have assumed as a matter of statutory construction. The debates on this amendment demonstrate the wisdom of not construing amendments, such as these, so as to apply to pending cases in the absence of a clear indication of such legislative intention on the part of Congress.[22]

But, even if *U. S.* v. *McCrory* was correctly decided, the present case is distinguishable. Here, the legislative history is such that no inference can be drawn, as might have

[22] Mr. Ray, the Floor Leader of the bill, H. R. 5493, stated: "In 1898 we passed a bill taking jurisdiction from the circuit and district court of certain claims against the government * * * and relegating all such claims to the Court of Claims. In doing so *we had no purpose to abate or discontinue pending suits* where the claimants had already gone into court, filed their bills and commenced their actions, and in some cases had obtained judgment." (Cong. Rec. 56th Cong., 1st Sess., p. 1017.)

In reporting favorably on the bill, the Attorney General pointed out that, as here, "some claimants were left remediless, being barred by the statute of limitations from beginning their actions anew in the Court of Claims" and added, "As it was *undoubtedly not the intention* of Congress that the results above enumerated should follow from the passage of the Act of June 27, 1898, it seems to me that the bill under consideration is manifestly just." (H. R. Rept. No. 72, 56th Cong., 1st Sess.)

been under the 1878 Amendment, that the absence of a saving clause implies an affirmative intent to cover all situations within the literal scope of the statute. (See pp. 32, 33, 34, *supra*.)

We submit, therefore, that this case comes squarely within the rationale of *United States* v. *St. Louis, San Francisco and Texas Ry. Co., supra*, and that Sec. 50(b) of Pub. Law 248, despite the absence of a saving clause, is not to be construed as affecting this or other pending cases. A court should always be loath to assume that "the legislature by inadvertence has committed an act of legislative injustice". *Plumstead Board of Works* v. *Spackman, supra*.

CONCLUSION.

For the reasons set forth above, we submit that the decision below should be reversed with instructions to direct the District Court to overrule the Respondent's Motion to Dismiss.

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